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September 8, 1998

THOMAS J. HUTTON
202-828-1892

VIA HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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SEP 8 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: In the Matter of
Amendment of Section 73.202(b),
Table of Allotments, FM Broadcast Stations.
(Saratoga, Wyoming)
MM Docket No. 98-130; RM-_____

Dear Ms. Salas:


Transmitted herewith, on behalf of Mount Rushmore Broadcasting, Inc., is an original and four (4) copies of its Comments and Counterproposal in the above-captioned rule making proceeding.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If you have any questions, please contact the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP


Thomas J. Hutton
Counsel for
Mount Rushmore Broadcasting, Inc.

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Enclosure

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 98-130
Table of Allotments,)	RM-_____
FM Broadcast Stations.)	
(Saratoga, Wyoming))	

To: Chief, Allocations Branch

COMMENTS AND COUNTERPROPOSAL

I. INTRODUCTION.

1. Mount Rushmore Broadcasting, Inc. ("Mount Rushmore"), by its attorneys, files its Comments and Counterproposal with respect to the Notice of Proposed Rule Making ("NPRM") released by the Allocations Branch on July 8, 1998 (DA 98-1377). The NPRM, issued at the request of Mountain Tower Broadcasting ("Mountain Tower"), proposes to allot Channel 259C to Saratoga, Wyoming.

2. Mount Rushmore respectfully urges the Commission to reexamine its FM allocation policy, so as to better serve the public interest. In conjunction with the Commission's pending rule making on auction procedures for mutually exclusive commercial broadcast license applications (*Notice of Proposed Rule Making*, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264 (rel. Nov. 26, 1997)) and with its notice of inquiry on the broadcast ownership rules (*Notice of Inquiry*, MM Docket No. 98-35 (rel. Mar. 13, 1998)), the Commission should institute a notice of inquiry to determine (1) whether the current FM allocation policy continues to meet the Commission's obligation under Section 307(b) of the Communications Act of 1934 (the "Act"), as amended, and (2) whether the policy has been detrimental to the

enhancement of minority ownership of FM broadcast stations. In the meantime, the Commission should cease application of its FM allocation policy.

3. Alternatively, if the Commission nonetheless decides to apply its current FM allocation policy here, then Mount Rushmore proposes to allot Channel 259A to Saratoga, Wyoming, and Channel 259C1 to Green River, Wyoming, which will provide a first local service to Saratoga and a second FM service to Green River.

II. THE COMMISSION SHOULD INSTITUTE A NOTICE OF INQUIRY TO EVALUATE WHETHER THE CURRENT FM ALLOCATION POLICY CONTINUES TO MEET THE COMMISSION'S OBLIGATION UNDER SECTION 307(b) OF THE ACT AND WHETHER THE POLICY HAS BEEN DETRIMENTAL TO THE ENHANCEMENT OF MINORITY OWNERSHIP OF FM BROADCAST STATIONS.

4. The FM Table of Assignments ("FM Table") is intended to allow the Commission to meet its obligation under Section 307(b) of the Act to provide a "fair, efficient and equitable distribution of radio service" to the various states and the communities within them. The Commission has stated that the objectives to be served by the FM Table are:

- * Provision of some service of satisfactory signal strength to all of the country;
- * Provision of as many program choices to as many listeners as possible; and
- * Service of local origin to as many communities as possible.

Second Report and Order, 90 F.C.C. 2d 88, 89 (1982).

5. In its *Second Report and Order*, in response to the growing demand for FM channels, the Commission reevaluated its original FM priorities (adopted in 1961) and adopted new, updated FM priorities to evaluate conflicting allocation proposals. The priorities are:

- "(1) First full-time aural service.

- (2) Second full-time aural service.
- (3) First local service.
- (4) Other public interest matters.

[Co-equal weight would be given to priorities (2) and (3)]."

Second Report and Order, 90 F.C.C. 2d at 91. Under FM priority 4, the Commission considers factors such as population served and the availability of other services. See *Eaton and Sandy Springs, Georgia, et al.*, 6 FCC Rcd 6580, 6585 (Mass Media Bur. 1991).

6. Mount Rushmore urges the Commission to again reevaluate and update its FM priorities. In the current environment of high demand for and low supply of FM channels everywhere, the existing FM allocation policy no longer meets the Commission's obligation under Section 307(b), nor serves the objectives of the FM Table. In particular, the Commission's application of the current FM priorities to conflicting allocation proposals have resulted in inadequate attention to local service and the needs of smaller, rural communities.

7. Indeed, in cases involving conflicting proposals, the existing FM priorities favor large, urban areas over smaller, rural communities. For example, under the Commission's current FM allocation policy, in cases involving a choice between second aural and first local services or between two first local services, preference would be given to the larger, more populous community, leaving the smaller communities underserved. See *Second Report and Order*, 90 F.C.C. 2d at ¶ 11; *St. Marks and Woodville, Florida*, 12 FCC Rcd 11,957 (Alloc. Branch 1997).

8. The institution of auctions for contested FM cases is another recent development that makes it appropriate to reexamine the Commission's FM allocation policy. Now that the auction process will be used to select the party that will use a particular channel, it is more

important than ever to make sure that channels are allocated to the appropriate communities. The Commission's system of adding channels through petitions by parties such as Mountain Tower should be suspended and reexamined in light of current conditions, including the new auction procedure. Accordingly, the Commission should institute a notice of inquiry to determine whether its current FM allocation policy meets the Commission's obligation under Section 307(b) of the Act.

9. In addition, the Commission's existing FM allocation policy may be detrimental to the enhancement of minority ownership of FM broadcast stations because the current policy favors incumbent station owners that have the knowledge, resources and financial means to institute a petition for rule making to amend the FM Table, to apply for a construction permit, and then to participate in an auction for the new FM station.

10. In his speech to the NAB Convention in April 1998, Chairman Kennard reported that he was "dismayed to see that minority broadcast ownership was a mere 3.1% in 1996. This year that's dropped to 2.8%." With respect to radio stations, in particular, the number of minority-owned commercial radio stations declined from 312 in 1995 to 284 in 1996/97. *See* Minority Commercial Broadcast Ownership in the U.S., a report of the Minority Telecommunications Development Program, National Telecommunications and Information Administration (Aug. 1997).

11. The Commission has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encourage minority participation in the telecommunications industry. Indeed, in his recent speech at the NAB Convention, Chairman Kennard issued a challenge to the

broadcast industry to “develop ideas to promote opportunity for ownership by minorities and women within the broadcast industry.”

12. Accordingly, Mount Rushmore proposes that the Commission institute a notice of inquiry to determine whether its current FM allocation policy has been detrimental to the enhancement of minority ownership of FM stations and to explore ways to foster opportunities in broadcast ownership for minorities and women. The Commission has an obligation to act now and, in the interim, to cease application of its current FM allocation policy.

III. CHANNEL 259A, SARATOGA, WYOMING AND CHANNEL 259C1, GREEN RIVER, WYOMING IS THE PREFERRED ALLOCATION.

13. In the event the Commission decides to proceed with this particular rule making, Mount Rushmore proposes the allotment of Channel 259A to Saratoga, Wyoming and Channel 259C1 to Green River, Wyoming, which will provide a first local service to Saratoga and a second FM service to Green River. Mount Rushmore’s proposal is the preferred allocation because it would provide new or additional service to two communities, whereas Mountain Tower’s proposed allotment of Channel 259C to Saratoga, Wyoming would provide a first local service to only one community. As demonstrated in the Engineering Statement attached hereto as Exhibit E, Channel 259A may be assigned to Saratoga, Wyoming and Channel 259C1 to Green River, Wyoming in full compliance with Section 73.202(b) of the Commission’s Rules. If Mount Rushmore’s proposal is adopted, Mount Rushmore will apply for construction permits for Channel 259A in Saratoga and Channel 259C1 in Green River.

14. Saratoga is an incorporated resort community with a population of 1969, as designated by the U.S. Census.¹ Saratoga is located in Carbon County which has a population of 16,659 persons. The community of Saratoga has its own its own mayor, town council, town hall, Chamber of Commerce, post office, zip code, police department, and volunteer fire department. Saratoga also has 3 schools, 8 churches, a library, 2 banks, 10 restaurants, 4 hotels, 20-25 other businesses, and a complement of social and civic organizations. Tourism at nearby Medicine Bow National Forest increases the population of this community during the months of May-September. Saratoga is an underserved community and has a need for a daily resource for information on current civic, cultural and school issues and events that could be provided by a local radio station.

15. Green River is an incorporated community just north of the Flaming Gorge National Recreation Area. The U.S. Census designates Green River as a community and credits it with a population of 12,711 people. Green River is located in Sweetwater County which has a population of 38,823. There is a significant year-round transient population in Green River as a result of tourists visiting Flaming Gorge. Green River has several campgrounds with access to Flaming Gorge where tourists set up camp and enjoy fishing, biking, hiking, cross-country skiing, riding snowmobiles, ice-fishing, and exploring on snowshoes nearby in the recreational area. The community of Green River is governed by an elected mayor and a city council, and has its own city hall, Chamber of Commerce, post office, zip code, police department and volunteer fire department. Green River also has 12 schools, a library, 12 churches, 10-12 restaurants, 6 hotels, several civic and social organizations, and a complement of other businesses

¹ Hereinafter, all population data are based on the 1990 U.S. Census.

usual to a community of its size. Channel 259C1 would provide a third aural service and a second FM service to this underserved community. Currently, Green River has one local AM station and a construction permit for a new FM station. A community, such as Green River, with a population in excess of 12,000 people is deserving of a second FM channel which would provide another outlet for local expression.

16. Where, as here, the first two FM priorities are not implicated, the Commission must be guided by FM priorities 3 and 4. As proposed by Mount Rushmore, the allotment of Channel 259A to Saratoga, Wyoming would provide a first local service to Saratoga and the allotment of Channel 259C1 to Green River, Wyoming would provide a third aural service and second FM service to Green River. Mountain Tower's proposal to allot Channel 259C to Saratoga, Wyoming would provide a first local service to that community. While both proposals fulfill FM priority 3, Mount Rushmore's proposal also fulfills FM priority 4 by providing additional service to an underserved community. Further, the combined populations of Saratoga and Green River (14,680) is greater than the population of Saratoga alone (1969). Mount Rushmore's proposal, therefore, would result in more efficient use of the channels. Accordingly, the public interest favors the grant of Mount Rushmore's proposal which would provide new or additional service to the most people.

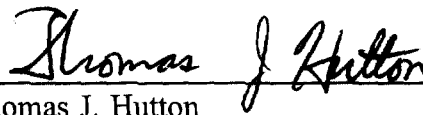
IV. CONCLUSION.

For the reasons stated above, Mount Rushmore respectfully requests that the Commission institute a notice of inquiry to determine (1) whether the current FM allocation policy continues to meet the Commission's obligation under Section 307(b) of the Act, and (2) whether the policy has been detrimental to the enhancement of minority ownership of FM broadcast stations. In the

meantime, the Commission should cease application of its FM allocation policy. If, however, the Commission nonetheless decides to apply its current FM allocation policy here, then Mount Rushmore respectfully requests that the Commission adopt its Counterproposal and allot Channel 259A to Saratoga, Wyoming and Channel 259C1 to Green River, Wyoming.

Respectfully submitted,

Mount Rushmore Broadcasting, Inc.

A handwritten signature in dark ink, appearing to read "Thomas J. Hutton", is written over a horizontal line.

Thomas J. Hutton
Patricia Y. Lee

Its Attorneys

Holland & Knight LLP
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Suite 400
Washington, D.C. 20037
(202) 955-3000

September 8, 1998

WASI-379246

CERTIFICATE OF SERVICE

I, Ellen Dorsey, an employee of Holland & Knight LLP, hereby certify that on September 8, 1998, a copy of the foregoing Comments and Counterproposal of Mount Rushmore Broadcasting, Inc. was served by first class U.S. Mail, postage prepaid, to the following:

Victor A. Michael, Jr.
President
Mountain Tower Broadcasting
7901 Stoneridge Drive
Cheyenne, WY 82009

Counsel for Mountain Tower Broadcasting

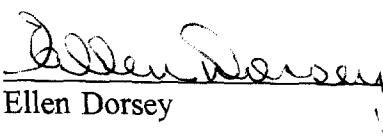

Ellen Dorsey

EXHIBIT E
ENGINEERING STATEMENT RE:
MODIFICATION OF THE FM TABLE OF ALLOTMENTS
MM DOCKET NO. 98-130
MT. RUSHMORE BROADCASTING, INC.
SARATOGA, WYOMING

INTRODUCTION

This statement was prepared on behalf of Mt. Rushmore Broadcasting, Inc. ("Mt. Rushmore"). It is presented in support of a counterproposal to the proposed modification of Section 73.202(b) of the Rules of the Federal Communications Commission (FCC Rules) in the above referenced Docket.

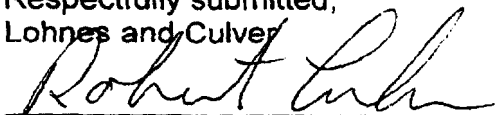
COUNTERPROPOSAL AND ALLOCATION STUDY

The following additions to the FCC Table of Allotments, Section 73.202(b) are proposed:

Channel 259A	--	Saratoga, Wyoming
Channel 259C1	--	Green River, Wyoming

An allocation separation study has been conducted for each of the above allotments. Attached as Figures 1 and 2 are the study results for the two communities respectively. The proposed allotments were all found to comply with the minimum distance separations specified in Section 73.207 of the FCC Rules from the assumed allocation coordinates specified for each community. The assumed allotment sites meet the requirements of Section 73.315(a) of the FCC Rules.

Respectfully submitted,
Lohnes and Culver



by Robert D. Culver, P.E.
Md. Reg. No. 19672
September, 1998

**FIGURE 1
FM ALLOCATION STUDY
RE: PROPOSED ADDITION OF
CHANNEL 259C1 TO GREEN RIVER, WYOMING**

<u>CHANNEL</u>	<u>STATION</u>		<u>CITY, STATE</u>	<u>DISTANCE SEPARATION IN KM</u>	
	<u>CALL</u>	<u>CLASS</u>		<u>ACTUAL</u> ⁽¹⁾	<u>REQUIRED</u> ⁽²⁾
205	No stations within required separation plus 50 kilometers				
206	No stations within required separation plus 50 kilometers				
256	KNYN(FM)	C1	Fort Bridger, WY.	122	82
257	No stations within required separation plus 50 kilometers				
258	KURR(FM)	C	Bountiful, UT	248	209
259	PADD	C	Saratoga, WY.	208	270 ⁽³⁾
260	KEKB(FM)	C	Fruita, CO.	280	209
261	No stations within required separation plus 50 kilometers				
262	No stations within required separation plus 50 kilometers				

Assumed Allotment site coordinates: 41° 31' 36" 109° 28' 06"

- Notes:
- (1) Calculated distance separation between stations in accordance with Section 73.208 of the FCC Rules.
 - (2) Required minimum distance separation between stations per Section 73.207 of the FCC Rules.
 - (3) Mutually exclusive pending Allocation D98-130.

FIGURE 2
FM ALLOCATION STUDY
RE: PROPOSED ADDITION OF
CHANNEL 259A TO SARATOGA, WYOMING

<u>CHANNEL</u>	<u>STATION</u>		<u>CITY STATE</u>	<u>DISTANCE SEPARATION IN KM</u>	
	<u>CALL</u>	<u>CLASS</u>		<u>ACTUAL</u> ⁽¹⁾	<u>REQUIRED</u> ⁽²⁾
205	No stations within required separation plus 50 kilometers				
206	No stations within required separation plus 50 kilometers				
256	No stations within required separation plus 50 kilometers				
257	No stations within required separation plus 50 kilometers				
258	KKHK(FM)	C	Denver, CO.	233	165
259	PADD	C	Saratoga, WY.	16.3	226 ⁽³⁾
260	KRRR(FM)	C2	Cheyenne, WY	172	106
261	No stations within required separation plus 50 kilometers				
262	No stations within required separation plus 50 kilometers				

Assumed Allotment site coordinates: 41° 27' 12" 106° 48' 30"

- Notes:
- (1) Calculated distance separation between stations in accordance with Section 73.208 of the FCC Rules.
 - (2) Required minimum distance separation between stations per Section 73.207 of the FCC Rules.
 - (3) Mutually exclusive pending Allocation D98-130.